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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JOAN VELARDE, Plaintiff and Respondent, v. TRICOR AMERICA, INC., Defendant and Appellant.	A153351 (San Mateo County Super. Ct. No. 17-CIV-04141)

Tricor America, Inc. (Tricor) appeals the trial court's order denying Tricor's petition to compel arbitration. We affirm.

BACKGROUND

In 2017, Joan Velarde (Plaintiff) filed a wage and hour class action complaint against Tricor.[1] Tricor filed a petition to compel arbitration, arguing the parties had executed a contract requiring arbitration of their disputes. Tricor submitted three documents as evidence of this contract. First, Tricor submitted a February 2016 memorandum to employees stating Tricor "is implementing an 'arbitration agreement' (attached)," followed by a two-page document entitled "Mutual Agreement to Arbitrate Disputes" (capitalization altered; hereafter, the Arbitration Agreement) that had been executed by an employee other than Plaintiff. The second page of the Arbitration Agreement included the agreement's final three paragraphs, followed by a horizontal line

[1] A second defendant was subsequently dismissed from the lawsuit.

of asterisks. After the line of asterisks was the following: "I have read the foregoing Mutual Agreement to Arbitrate Disputes, understand it and agree to abide by its terms." Beneath this sentence were signature blocks for the employee and Tricor. As noted above, the employee signature block had been executed by an employee other than Plaintiff. The second document Tricor submitted as evidence of the contract was a blank version of the two-page Arbitration Agreement, without the preceding memorandum. Third, Tricor submitted a page containing only the line, "I have read the foregoing Mutual Agreement to Arbitrate Disputes, understand it and agree to abide by its terms," with the signature blocks completed by Plaintiff and a Tricor representative. This page had apparently been torn off the second page of the Arbitration Agreement, below the line of asterisks.[2]

Tricor submitted declarations providing that, in February 2016, Tricor's Human Resources Manager attached the memorandum and Arbitration Agreement to each employee's paycheck; the Office Manager at Velarde's location "arranged for" employee paychecks and any attached documents to be distributed to each employee's "cubby"[3]; and some employees, after signing the Arbitration Agreement, tore off the portion of the second page below the line of asterisks and returned only that portion to Tricor.

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[2] The pagination of these three documents varied. On the three-page document—containing the memorandum and the Arbitration Agreement executed by another employee—the signature block is on page "3." The torn-off page signed by Plaintiff is also numbered page "3." However, on the blank two-page Arbitration Agreement, the signature block is on page "2." Tricor submitted a declaration from its Human Resources Manager averring, "The first page/cover sheet [of the three-page document] as it existed in February 2016 was subsequently eliminated. The two pages of the actual agreement were subsequently renumbered, so that the signature page on the Arbitration Agreement was numbered '2,' but the text of the agreement was not altered. . . . The renumbered Arbitration Agreement as shown in [the two-page blank version] represents the version that was circulated to Tricor's employees at times after February 2016."

[3] The Office Manager testified at her deposition that she did not remember whether she personally placed the paycheck and Arbitration Agreement in each employee's cubby and did not remember seeing anyone else do so.

At his deposition, Plaintiff authenticated his signature on the torn-off page containing the Arbitration Agreement's signature block. Plaintiff also testified he did not receive the entire Arbitration Agreement from Tricor, had never seen it, and had not discussed an arbitration agreement with anyone at Tricor. Plaintiff testified it was Tricor's "policy . . . that everything be signed without questioning it" or else "you would lose your job."

The trial court denied Tricor's motion to compel arbitration, finding Tricor "failed to meet its moving burden of demonstrating the existence of an agreement to arbitrate this controversy." The trial court credited Plaintiff's "consistent[] state[ments] that he did not receive the arbitration agreement. If he did sign the one-page signature sheet, it was because it was placed in his cubby and Tricor employees were expected to blindly sign everything or risk losing their jobs. Plaintiff testified that he was never made aware that he was signing an arbitration agreement when given the one-page signature sheet to execute."

DISCUSSION

"Code of Civil Procedure section 1281.2 requires a trial court to grant a petition to compel arbitration 'if [the court] determines that an agreement to arbitrate the controversy exists.' (Code Civ. Proc., § 1281.2.) Accordingly, ' "when presented with a petition to compel arbitration the trial court's first task is to determine whether the parties have in fact agreed to arbitrate the dispute. [¶] . . ." [Citation.]' [Citations.] 'A party seeking to compel arbitration has the burden of proving the existence of a valid agreement to arbitrate.' " (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 59 (*Avery*).) "[W]e apply general California contract law to determine whether the parties formed a valid agreement to arbitrate their dispute." (*Id.* at p. 60.)

" 'There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed.' " (*Avery, supra,* 218 Cal.App.4th at p. 60.)

I. *Tricor's Motion to Strike*

Tricor filed a motion to strike Plaintiff's respondent's appendix, arguing none of the appendix's five documents were part of the trial court record. In his opposition to the motion, Plaintiff suggests an appendix may include documents not before the trial court. Plaintiff is mistaken. "An appellant's appendix may only include copies of documents that are contained in the superior court file." (*The Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 404; see also Cal. Rules of Court, rule 8.124(g) ["Filing an appendix constitutes a representation that the appendix consists of accurate copies of documents in the superior court file."].)[4] Because there is no indication any of the documents in Plaintiff's appendix were before the trial court, we grant Tricor's motion to strike the appendix.[5]

We disregard any references in Plaintiff's response brief to the materials in his appendix. Because of this disregard, we deny as moot Tricor's motion to strike Plaintiff's response brief or to order Plaintiff file a new brief without references to the materials in Plaintiff's appendix. Tricor also seeks monetary sanctions against Plaintiff for his violation of rule 8.124(g). We have stricken Plaintiff's appendix and decline to impose additional sanctions.[6]

II. *Evidentiary Objections*

Tricor argues the trial court erred in overruling its evidentiary objections. We agree in part, but find the error harmless.

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[4] All undesignated rule references are to the California Rules of Court.

[5] While both parties refer to two of the documents in Plaintiff's appendix as tentative rulings of the court, the documents are in fact emails from a paralegal to Plaintiff's attorney, purporting to contain tentative rulings from the court. There is no indication the emails themselves were part of the trial court record.

[6] Tricor's motion also seeks to strike Plaintiff's request for judicial notice. We address this portion of the motion below (*post*, fn. 8).

A. *Plaintiff's Deposition*

Tricor submitted excerpts from Plaintiff's deposition testimony in support of its petition to compel arbitration. Plaintiff submitted additional excerpts from his deposition testimony in opposition to the petition. Tricor objected below to Plaintiff's use of his own deposition testimony on the ground that such a use was not authorized by Code of Civil Procedure section 2025.620.[7] The trial court overruled the objection without analysis.

Tricor renews its objection on appeal. Tricor argues section 2025.620 provides deposition testimony can be used at trial or other hearings only in limited circumstances. Plaintiff relies on section 2025.620, subdivision (c)(1), which provides "Any party may use for any purpose the deposition of any person or organization, including that of any party to the action, if the court finds . . . [¶] (1) The deponent resides more than 150 miles from the place of the trial or other hearing."

In its reply brief, Tricor first argues this is "an entirely new argument," suggesting Plaintiff forfeited it.[8] "The rule against raising new theories on appeal is limited by the rule that an appealed judgment or order will be affirmed if it is *correct on any theory*, regardless of the trial court's reasons in support. Thus, *respondent* can assert a new theory on appeal in order to establish that the judgment was correct on that theory *unless* doing so would unfairly prejudice appellant by depriving him or her of the opportunity to litigate an *issue of fact*." (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2018) ¶ 8:241.) Tricor does not assert any such prejudice, and Plaintiff is not precluded from raising this theory.

Tricor next contends there is no record support for Plaintiff's place of residence. In the excerpts of Plaintiff's deposition testimony submitted by Tricor, Plaintiff testified he lives in Corona. We grant Plaintiff's request for judicial notice of the fact that Corona

[7] All undesignated section references are to the Code of Civil Procedure.

[8] Tricor's evidentiary objections were filed shortly before the hearing and Plaintiff did not file any written response.

is more than 150 miles from the courthouse in San Mateo where the hearing was held.[9] Accordingly, Plaintiff's use of his own deposition testimony was authorized by section 2025.620, subdivision (c)(1).

B. *Other Evidence*

Plaintiff submitted his declaration in Spanish and English. The English version of Plaintiff's declaration provides, "My primary language is Spanish. . . . . I may know some words or short phases but not enough to have a full conversation [or] understand documents in English." Tricor argues the declarations are inadmissible because the English translation was not accompanied by an interpreter's certification. (See rule 3.1110(g) ["Exhibits written in a foreign language must be accompanied by an English translation, certified under oath by a qualified interpreter."].) Plaintiff's only response is to point to a portion of his deposition where he reviewed his Spanish declaration and testified its contents were correct. This authentication of the Spanish declaration does not address Plaintiff's failure to provide an interpreter's certification with the English translation. The trial court erred in admitting Plaintiff's declarations.

Plaintiff also submitted his own responses to Tricor's interrogatories and requests for admission. Tricor argues Plaintiff cannot use these as evidence against Tricor. We agree. (See § 2030.410 ["At the trial or any other hearing in the action, so far as admissible under the rules of evidence, the propounding party or any party other than the responding party may use any answer or part of an answer to an interrogatory *only against the responding party*." (italics added)]; § 2033.410, subd. (b) ["any admission made by a party under this section is binding *only on that party*" (italics added)].)

However, we also agree with Plaintiff that his deposition testimony provides the critical evidence in this case. The trial court's error in admitting Plaintiff's declarations

[9] Tricor did not timely oppose Plaintiff's request for judicial notice. (Rule 8.54(a)(3) [opposition must be filed within 15 days after motion is filed].) Instead, more than two months later, Tricor filed a motion to strike Plaintiff's request for judicial notice. We construe this motion as an opposition to Plaintiff's request and deny it as untimely. Even if the opposition were not untimely, we would reject it as it is based solely on the asserted lack of record evidence of Plaintiff's residence.

and discovery responses was harmless, and we do not rely on this evidence in our resolution of the appeal.

III. *Arbitration Agreement*

A. *Substantial Evidence*

Tricor argues the evidence shows Plaintiff received the entire Arbitration Agreement. To be sure, there is evidence from which a trier of fact could so find. But the trial court credited Plaintiff's deposition testimony that he did not receive the entire Arbitration Agreement and only signed the signature page or torn-off signature page because Tricor employees were expected to blindly do so or else lose their jobs. " ' " '[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' " ' " (*Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 750.) " ' " 'To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.' " ' " (*Ibid.*) No such circumstances are present here and we are thus bound by the trial court's credibility finding.

Tricor contends Plaintiff initially denied signing the torn-off signature page (a contention that Plaintiff disputes), and only later conceded it is his signature. However, Tricor presents no authority that this initial denial, if true, fatally undermines Plaintiff's credibility. (Cf. CACI No. 5003 ["if you think the witness did not tell the truth about some things but told the truth about others, you may accept the part you think is true and ignore the rest"].)

Tricor's reliance on *Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416 (*Craig*) is unavailing. In *Craig*, as here, the parties submitted conflicting evidence regarding whether the plaintiff received a copy of the arbitration agreement. (*Id.* at p. 420.) However, unlike here, the trial court credited the employer's evidence and found the plaintiff did receive a copy of the agreement. (*Ibid.*) That substantial evidence supported such a finding in *Craig* does not undermine the trial court's opposite finding in this case. (See *id.* at p. 421 ["The trial court decided that issue [whether the employee

received the arbitration agreement] in favor of [the employer], and its credibility call is binding on this appeal."].)

In sum, Plaintiff's deposition testimony, credited by the trial court, provides substantial evidence supporting the court's finding that Plaintiff did not receive the entire Arbitration Agreement.

B. *Executed Signature Page*

Tricor also argues Plaintiff's execution of the signature page—even if he did not receive the entire Arbitration Agreement—constitutes, as a matter of law, his agreement to be bound by the Arbitration Agreement. Specifically, Tricor contends Plaintiff executed a contract providing that he "read the foregoing Mutual Agreement to Arbitrate Disputes, understand[s] it and agree[s] to abide by its terms" and, because the term "Mutual Agreement to Arbitrate Disputes" is not ambiguous, the effect of the signature page is to bind Plaintiff to the Arbitration Agreement. However, Tricor does not provide authority that a contract's unambiguous reference to another document renders that document's terms part of the contract.

Instead, as Plaintiff argues, the question is whether the terms of the Arbitration Agreement were incorporated into the executed signature page. In *Avery*, employees of Tenet signed an "Employee Acknowledgment Form" stating, inter alia: " 'I acknowledge that I have received a copy of the Tenet Fair Treatment Process brochure. I hereby voluntarily agree to use the Company's Fair Treatment Process and to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet.' " (*Avery, supra,* 218 Cal.App.4th at p. 56.) To determine whether this signed acknowledgment form constituted an arbitration agreement, the Court of Appeal considered whether it incorporated by reference the "Fair Treatment Process": " ' " ' "[T]he parties may incorporate by reference into their contract the terms of some other document. [Citations.] But each case must turn on its facts. [Citation.] For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other

party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties." ' [Citations.]" [Citation.]' [Citation.] . . . If these conditions are met, an employee may agree to arbitrate claims against his or her employer by signing an acknowledgment form that incorporates the employer's employee handbook and the arbitration policy it contains." (*Id.* at p. 66.) Because the employer failed to establish all of these conditions, the Court of Appeal found the acknowledgment form did not create a binding agreement to arbitrate. (*Id.* at pp. 68–70.)

As in *Avery*, Tricor has failed to establish all of the conditions necessary to incorporate the Arbitration Agreement into the executed signature page. Plaintiff testified he did not know the terms of the Arbitration Agreement and he was expected to sign documents from Tricor without asking questions or risk losing his job. The trial court credited this testimony, and thus impliedly found the terms of the Arbitration Agreement were not "known or easily available to" Plaintiff—the third condition necessary to incorporate the Arbitration Agreement's terms. Accordingly, we conclude the executed signature page does not, as a matter of law, bind Plaintiff to the terms of the Arbitration Agreement.[10]

DISPOSITION

The order is affirmed. Respondent is awarded his costs on appeal.

[10] Tricor's reliance on the public policy favoring arbitration does not alter our analysis. "The ' " ' " '. . . policy favoring arbitration cannot displace the necessity for a voluntary *agreement* to arbitrate.' " [Citation.] "Although '[t]he law favors contracts for arbitration of disputes between parties' [citation], ' "there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate . . . ." ' " ' " ' " (*Avery, supra,* 218 Cal.App.4th at p. 59.)

SIMONS, J.

We concur.

JONES, P.J.

BURNS, J.

(A153351)